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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

**NATIVE FISH SOCIETY,
MCKENZIE FLYFISHERS,**

Plaintiffs,

v.

**NATIONAL MARINE FISHERIES
SERVICE, PENNY PRITZKER,
Secretary of Commerce, WILLIAM STELLE,
Regional Administrator, NMFS, OREGON
DEPARTMENT OF FISH & WILDLIFE,
ROY ELICKER, Director, ODFW,
BRUCE McINTOSH, Acting Fish
Division Administrator, ODFW, CHRIS
WHEATON, Northwest Region Manager,
ODFW,**

Case No.: 3:12-cv-431-HA

**PLAINTIFFS'
RESPONSE TO NMFS'S MOTION
MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
REPLY IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

Defendants.

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GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
BiOp	Biological Opinion
BMP	Best Management Practice
DPS	Distinct Population Segment
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
ESU	Evolutionarily Significant Unit
FONSI	Finding of No Significant Impact
HCP	Habitat Conservation Plan
HGMP	Hatchery and Genetic Management Plan
HSRG	Hatchery Scientific Review Group
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
ODFW	Oregon Department of Fish & Wildlife
pHOS	Proportion of Hatchery-Origin Spawners
USFWS	U.S. Fish & Wildlife Service

GLOSSARY OF TERMS

Integrated recovery program - An artificial propagation project primarily designed to aid in the recovery, conservation or reintroduction of particular natural population(s), and fish produced are intended to spawn in the wild or be genetically integrated with the targeted natural population(s). Sometimes referred to as “supplementation”. (AR 16413–14 – ODFW Definition)

Isolated harvest program - Project in which artificially propagated fish produced primarily for harvest are not intended to spawn in the wild or be genetically integrated with any specific natural population. (AR 16414 – ODFW Definition)

Hatchery programs are classified as genetically *integrated* if a principal goal is to minimize potential genetic divergence between the hatchery broodstock and a naturally-spawning population such that natural-origin fish are systematically included in the broodstock each year or generation. (AR 21180 – HSRG Definition)

Hatchery programs are classified as genetically *segregated* if the broodstock is propagated as a reproductively distinct population primarily, if not exclusively, from adult returns back to the hatchery. In segregated programs, little or no gene flow should occur from a naturally spawning population to the hatchery broodstock. (AR 21180 – HSRG Definition)

INTRODUCTION

The ESA and NEPA strictly cabin the circumstances in which an agency may lawfully make an uninformed and speculative decision when preparing a NEPA analysis, developing a biological opinion, and approving an HGMP. The overall thrust of NMFS's defense of its decisions appears to be that the HGMPs are somewhat less harmful to wild fish than the last twelve years of lawless hatchery operations, and therefore it is reasonable to conclude that there are no significant impacts and there will be no jeopardy to threatened salmonids in the Sandy Basin. These arguments ignore that the purpose of the ESA is to recover natural, self-sustaining populations and the potential of the Sandy River as a sanctuary for recovery of the wild fish that are essential to the survival and recovery of the LCR species. Fish populations in the Sandy are increasingly "unnatural," and the wild fish are not being allowed to sustain themselves without human intervention. NMFS's decisions, and the EA/FONSI and BiOp upon which they are based, are uninformed in critical areas and lack the analysis required by NEPA and the ESA.

NMFS's response is improper in three significant ways. First, NMFS relies on materials outside the administrative record that it did not present to this Court for review during the time prescribed in the scheduling order for conferral and briefing on extra-record materials, on repeated references to events that have occurred in 2013 to justify decisions made in late September 2012, and on *post hoc* rationalizations for the 2012 decisions. Second, NMFS's response is rife with straw-man caricatures of NFS's arguments that misrepresent NFS's actual arguments. Third, NMFS misrepresents the nature of the genetically segregated hatchery programs that it approved last September, asserting, for the first time, that two of the programs are actually "integrated," despite the HGMPs' description of the programs as "isolated" and the previous acknowledgement by NMFS's decisionmakers and in its EA that the programs are

“segregated.” NFS will file a separate motion to strike the extra-record filings by defendants and amici and references to events post-dating the September 2012 decisions.

ARGUMENT

I. FACTUAL BACKGROUND

NMFS asserts that it is incorrect to characterize the Sandy Hatchery programs as “segregated” programs and that NMFS “do[es] not want a so-called ‘segregated’ or ‘isolated’ hatchery program on the Sandy.” NMFS Opp. at 29. This is a *post hoc* rationalization, and also not true: the HGMPs that NMFS approved on September 28, 2012, expressly state that they are “isolated” or “segregated” programs, not integrated programs. The actual provisions of these programs described in the HGMPs and the EA trump NMFS’s litigation position.

All four of the Sandy Hatchery programs are “isolated harvest programs.” AR 16342 (winter steelhead), 16242 (spring Chinook), 16161 (coho); 10638 (summer steelhead). The HGMPs define “isolated harvest program” as a “[p]roject in which artificially propagated fish produced primarily for harvest *are not intended to spawn in the wild or be genetically integrated with any specific natural population.*” AR 16414 (emphasis added). The HSRG distinguishes “integrated” and “segregated” programs by whether wild fish are used as broodstock to propagate artificial fish. AR 21180; Glossary of Terms, *supra* at vii.

NMFS’s litigation position also contradicts the agency’s own statements in the EA that the programs are isolated/segregated. AR 16536 (“Beginning in 2011, under the proposed HGMP, the [spring Chinook] program would be operated as an isolated program using only returning hatchery-origin adults for broodstock ...”); AR 16542 (the coho program “is managed as a segregated hatchery program and would continue to be”); AR 16547 (“Beginning in 2011, no natural origin winter steelhead would be collected for broodstock; the program is intended to

remain segregated, and this is how it would be operated under the Proposed Action.”). The Sandy Hatchery spring Chinook and winter steelhead programs ceased to be integrated programs in 2010. NMFS approved them, as segregated harvest augmentation plans to release 300,000 hatchery-bred spring Chinook, 500,000 coho, 160,000 winter steelhead, and 75,000 non-native summer steelhead, with up to a 10% stray rate for each listed species, authorized to go on indefinitely. AR 16915–19, AR 16253 (“The project is ongoing, with no planned end date.”)¹

Several important facts flow from the fact that NMFS approved perpetual, segregated harvest programs, rather than continuing to integrate wild broodstock. First, harm to wild fish will manifest at lower hatchery stray rates from the segregated programs NMFS approved. Wild broodstock was last used in the Sandy Hatchery programs in 2010. *E.g.*, AR 16536, 16547. The best available science shows that deleterious genetic changes can occur within the first generation of hatchery breeding. AR 35570, 35584, 36480; Third Frissell Decl. (Dkt # 152) ¶¶ 13–14; Luikart Decl. (Dkt # 151) ¶¶ 19–24. For hatchery-bred fish brooded in 2011 without natural broodstock, the first generation of steelhead that will manifest adverse genetic effects will return to be bred artificially again in 2014 or 2015, and the first spring Chinook as early as 2014 to 2016. *See* AR 36481 (illustration of steelhead life cycle); AR 16925 (spring Chinook).

Second, NMFS is factually incorrect in representing that a 10% stray rate is “conservative,” NMFS Opp. at 30, because the “30% threshold” recommendation by the HSRG which NMFS cites applies only to integrated programs. AR 21323–24.² In fact, it pertains only to

¹NMFS concluded there would be no genetic domestic selection effects “because the programs are designed to segregate the hatchery populations from the naturally spawning populations.” AR 16587.

² Tellingly, NMFS does not cite the source for the “30%” figure or provide a direct quotation of the HSRG recommendation, either in its BiOp or briefing. AR 16958; NMFS Opp. at 30.

programs where the natural spawning of hatchery fish “is an intended purpose” of the program—which is not the case here. AR 16414, 21324. The HSRG recommendation for segregated programs such as the ones NMFS approved is to “ensure hatchery-origin adults constitute no more one to five percent of natural spawners in a watershed,” because “[s]tray rates as low as one to two percent for a large, segregated hatchery program may pose unacceptable biological risks to natural populations.” AR 21326; AR 21266 (“Stray rates as low as one to two percent for a large, segregated harvest program may pose unacceptable risks to natural populations.”). The HSRG makes no separate recommendation for a “segregated program with local origin broodstock,” nor does it discuss the “local” origin of the hatchery-bred population in its recommendations. AR 21324, 21326.

Thus, from a perspective of whether hatchery fish cause harm to wild fish, the scientific threshold for significant genetic harm is five percent for the segregated programs NMFS approved in September 2012. NMFS officials know this, despite the agency’s current litigation position. In May 2011, Rob Jones, who oversaw preparation of the BiOp, wrote to Richard Turner, articulating that 5% pHOS was the appropriate limit: “[I]f these are Primary [populations] *and we are not integrating*, then *haven’t we been shooting for a 5% pHOS ... I realize that the hatchery fish are derived from the local [populations] but ... I’m certain we can finesse this so let’s talk.*” AR 2000 (emphasis added). Turner replied that, because populations had been integrated, the pHOS could be “up to 15% hatchery spawners and still meet the low risk criteria,” but “[i]n the new program, *without natural fish in the broodstock*, the low risk criteria allows 10% for two generations *and then limits the proportion of hatchery spawners to 5%.*” *Id.* (emphasis added). He added that “*they should manage to meet 5% pHOS for all of the programs since the populations in the Sandy River are key to recovering all species.*” *Id.*

(emphases added). Yet NMFS approved the programs to be of indefinite duration, with a 10% stray rate, even as genetic divergence between the hatchery and naturally-spawning fish increases with each generation. AR 21326 (HSRG statement that “[a]fter several generations of artificial propagation, segregated hatchery broodstocks may pose genetic and ecological risks to naturally spawning populations that are not unlike those imposed by exotic or introduced species”). And NMFS never disclosed in the EA or BiOp the 5% limit universally acknowledged as the maximum safe limit for segregated programs. Nor did it provide any explanation, much less a reasoned one, in either of those documents, for its arbitrary change of direction from its unambiguous recognition in May 2011 that the pHOS limit for all programs should be 5%.

II. STANDARD OF REVIEW AND SCOPE OF EVIDENCE

For NMFS’s decisions to survive review under the APA, the “agency [] must articulate a rational connection between the facts found and the conclusions reached. ... [A court] will defer to an agency’s decision only if it is fully informed and well-considered ... and [the court] will disapprove of an agency’s decision if it made a clear error of judgment.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1022–23 (9th Cir. 2007) (internal citations and quotation marks omitted). The “keystone” of the Court’s review “is to ensure that the [agency] engaged in reasoned decisionmaking.” *Nw. Coal. for Alternatives to Pesticides v. EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (internal citations and quotation marks omitted). While “data interpretation and analysis are functions that often lie within an agency’s realm of expertise, it is [the Court’s] duty to review those functions to ascertain whether the agency’s actions were *complete*, *reasoned*, and *adequately explained*.” *Id.* (emphases added). “[W]here the agency’s reasoning is irrational, unclear, or not supported by the data it purports to interpret, [the Court] must disapprove the agency’s action.” *Id.* Where an agency argues for deference to its expertise, “it is

difficult for judges or interested parties to determine the propriety of the Agency's action without a justification for the action supported by clearly identified substantial evidence whose import is explained." *Id.* (citing *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 103–04 (2d Cir. 2007)).

Furthermore, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983) (citing, *inter alia*, *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997) ("an agency's decision can be upheld only on the basis of the reasoning in that decision"). An agency's litigation affidavits which constitute *post hoc* rationalizations are an improper basis for sustaining an agency's decision. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962)). Neither may post-decision information and factual developments be invoked to support the agency's decision. *Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811–12 (9th Cir. 1980). Where an agency does not advance a rationale in its own decision and supporting analytical documents, "the [agency's] argument is simply a *post hoc* rationalization advanced . . . to defend past agency action against attack." *Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1120 (9th Cir. 2010) (internal quotes omitted).

III. NMFS VIOLATED NEPA WHEN IT APPROVED THE HGMPs

NMFS's decisions not to prepare an EIS for the Sandy Hatchery HGMPs, and not to consider any alternatives besides the proposed action and no action, were arbitrary and capricious: the agency's articulation of those decisions in the EA is uninformed, inadequately explained, and bereft of reasoning, and this Court must disapprove them. *See Nw. Coal.*, 544 F.3d at 1052 n.7 (stating standard). The FONSI does not provide a "convincing statement of reasons" to explain why the action will not have a significant impact on the environment. *Blue*

Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998); AR 16661–68. NMFS has not taken the requisite “hard look” at the potential environmental impact of the action. *Ctr. for Biol. Diversity v. NHTSA*, 538 F.3d 1172, 1220 (9th Cir. 2008). NMFS’s arguments rest largely on *post hoc* rationalization because the agency is unable to point to the articulation of its litigation-based rationales in its decisions or supporting analytical documents.

A. NMFS Illegally Failed to Prepare an EIS.

NMFS ignores that the threshold for its duty to prepare an EIS is a low one: an agency must prepare an EIS if its action “*may* have a significant impact upon the environment.” *Nat’l Parks & Conservation Ass’n. v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (“*NPCA*”) (emphasis in original; internal quotes omitted); *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). To show that an action may have a significant impact, a “‘plaintiff need not show that significant effects *will in fact occur*,’ raising ‘substantial questions whether a project may have a significant effect’ is sufficient.” *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (emphasis in original) (internal citation omitted).

The language emphasized by NMFS that an EIS must be prepared if there may be “substantial degradation” of some human environmental factor has its genesis in *City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975), in which the Ninth Circuit held that a showing of substantial degradation would be *one* means of showing that an action is “significantly affecting the quality of the human environment” so as to warrant an EIS. 42 U.S.C. § 4332(2)(C); *see* NMFS Opp. at 9. However, as the CEQ regulations make clear, “[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.” 40 C.F.R. § 1508.27(b)(1). NMFS cannot dispute that hatchery fish harm wild fish when they spawn among the naturally-spawning populations, because NMFS itself detailed these impacts in defending the

listing of five steelhead species in 2008. *Cal. State Grange v. NMFS*, 620 F. Supp. 2d 1111, 1158 (E.D. Cal. 2008) (finding that “[h]atchery fish are less fit for survival in the wild than genetically similar wild fish” and that “[h]atchery releases have a significant negative effect on the productivity of wild populations”). There are substantial questions whether operation of the Hatchery will result in substantial degradation to the wild fish populations, and it is clear that the Hatchery’s operations *may* have “significant effects” on several aspects of the environment.

1. NMFS’s own arguments confirm that the context of the action requires preparation of an EIS and that the FONSI is arbitrary and capricious.

NMFS argues that the “context” of its decisions involves the historical presence of hatchery fish in the Sandy River basin and the efforts that ODFW and NMFS are making, after operating the hatchery illegally without an HGMP since 2000, to reduce impacts of hatchery-bred fish on naturally-spawning populations. NMFS Opp. at 9–12. This, however, is pure *post hoc* rationalization. Nowhere in the EA does NMFS discuss the context of the action in its determination that the action will have no significant effects. Although the FONSI notes the *obligation* to evaluate the significance of context, AR 16661, the FONSI (and the EA) contain no actual evaluation of the significance of the context of the action. AR 16661–68. Thus, the FONSI supplies no convincing statement of reasons why the context is not significant, rendering the EA and FONSI arbitrary and capricious. *Blue Mountains*, 161 F.3d at 1212.

In addition, NMFS’s argument disregards “the setting” of the proposed action, which is the focal point of the context analysis under the regulation. 40 C.F.R. § 1508.27(a). As NFS explained, the Sandy River is a unique setting for the potential recovery of wild fish with two of its dams removed and much of its habitat restored. NFS Br. (Dkt # 163) at 6, 15–16. NMFS also ignores the significance of the Sandy River wild fish populations to the Lower Columbia River species. There are more than 50 hatchery programs among the LCR species, but only 16 wild

populations not at high or very high risk—of which two (spring Chinook and coho) are in the Sandy River.³ NMFS downplays the importance of the wild fish in the Sandy to the survival and recovery of the LCR species. NMFS Opp. at 9–12. The basin’s potential as a setting for wild fish recovery, and the “unknown” and “uncertain” effects of the proposed action on these irreplaceable wild populations, underscores the significance of the Sandy River setting for the grand experiment that ODFW is conducting under the approved HGMPs.

NMFS’s argument that the HGMPs are expected to improve conditions further justifies an EIS. First, NMFS deems that the continued operation of the hatchery has “local importance;” cessation of the hatchery would have “relatively substantial effects;” and its operations “support significant public interests.” NMFS Opp. at 11 & n.4. Thus, the operation or cessation of the hatchery has significant “effects in the locale,” 40 C.F.R. § 1508.27(a). Second, as discussed below, NMFS is arguing that the proposed action will have significant beneficial effects (on both the natural and human environment)—an intensity factor that also requires an EIS. In addition, an agency cannot use the perceived benefits of a project to avoid preparing an EIS: it is through an EIS that an agency “weighs any significant negative impacts of the proposed action against the positive objectives of the project.” *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004) (noting also that “preparation of an EIS could allow additional study of key scientific issues”).

³ The Sandy River wild spring Chinook are the last spring Chinook population in the LCR Chinook ESU that has not been extirpated, and one of only four out of 32 natural populations (including fall Chinook) in the ESU not extirpated or at very high risk. AR 19551. The ESU contains 17 artificial propagation programs. 70 Fed. Reg. 37,160, 37,175 (June 28, 2005). (amending 2000 rule); *codified at* 50 C.F.R. § 223.203 The Sandy River wild coho are one of only three populations (of 27 natural populations) in that ESU not at very high risk. AR 19579. The LCR Coho ESU contains 25 artificial propagation programs. AR 19567. Seventeen of the 26 natural populations of the LCR Steelhead DPS are at high or very high risk, including the Sandy wild winter steelhead population. AR 19588. There are 10 artificial propagation programs for LCR Steelhead. AR 19581.

Finally, none of the cases NMFS cites support the proposition that the “context” of the action is rendered insignificant because some effects of a project may have environmental benefits.⁴

2. Approval of the HGMPs implicates at least six intensity factors.

When NMFS argues that the hatchery has local importance, and ceasing its operation would have “relatively substantial effects,” NMFS triggers an additional intensity factor: “[i]mpacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.” 40 C.F.R. § 1508.27(b)(1). Although NMFS now suggests that the proposed action will significantly benefit wild fish and “significant public interests” in maintaining the hatchery-driven fishery, the FONSI barely discusses this intensity factor. *Cf.* AR 16663, 16665. NMFS is wrong that its EA and FONSI provided a convincing statement of reasons why the other intensity factors are insignificant.

a. The Sandy River basin is a geographic area with unique characteristics.

Since 1999, the Sandy River basin above Cedar Creek has been designated as a “wild fish sanctuary.” NMFS Opp. at 13. NMFS does not dispute that the sanctuary is an “ecologically critical area” and therefore among the regulatory triggers for preparing an EIS. 40 C.F.R. § 1508.27(b)(3). NMFS is wrong, however, about the significance of the “wild fish sanctuary” designation. ODFW’s 2010 Recovery Plan explains that “[f]ish removal structures are currently being used to create ‘wild fish sanctuaries’ in some sub-watersheds and are being proposed as

⁴ Two of the cases involved no evaluation of the context factor at all. *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng’rs*, 524 F.3d 938, 957 (9th Cir. 2008) (no evaluation of the context factor, noting in passing that already-in-place mitigation measures would help remediate a historical mining area); *Umpqua Watersheds v. United States*, 725 F. Supp. 2d 1232, 1240-41 (D. Or. 2010) (no evaluation of context). The remaining case found that the “context” was insignificant because the project involved “a small amount of acreage, without any known Indiana bat hibernacula, in a large forest,” not because of its protective measures for bats. *Buckeye Forest Council v. U.S. Forest Serv.*, 378 F. Supp. 2d 835, 848 (S.D. Ohio 2005).

tools to help lower stray rates in other population areas.” AR 17360–61. Thus wild fish sanctuaries are areas where the *straying*—not the stocking—of hatchery fish is meant to be low or non-existent. Given that the majority of spawning habitat for wild listed fish is in the sanctuary, AR 16600, that removal of Marmot Dam “created an environment for upstream migration of hatchery [fish] into the natural spawning area,” AR 16254, and ODFW’s expressed intention in the HGMPs to maintain the upper Sandy River basin as a wild fish sanctuary with few or no hatchery fish, *e.g.* AR 16246, the upper Sandy River basin clearly is an “ecologically critical area” for wild fish, and a unique characteristic of the geographic area warranting an EIS.

NMFS’s argument that the wild fish sanctuary above the former Marmot Dam site is not a “type of area contemplated by the regulation,” NMFS Opp. at 13, depends on reading language into the NEPA regulation that is not there. Although NMFS cites a series of regulations for designating specific types of protected areas, NMFS Opp. at 13 n.5, only one—Wild and Scenic Rivers⁵—is specifically listed in the NEPA regulation. 40 C.F.R. § 1508.27(b)(3) (“Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.”). The regulation’s use of “such as” to modify “unique characteristics” indicates that the limitation to specific areas designated by regulation that NMFS proposes is untenable.⁶

⁵ Ironically, the Sandy, Salmon and Zigzag Rivers are designated Wild and Scenic Rivers, partly because of their anadromous fish runs. See <http://www.rivers.gov/rivers/salmon-or.php>; <http://www.rivers.gov/rivers/zigzag.php>; <http://www.rivers.gov/rivers/sandy.php> (last visited Sept. 26, 2013).

⁶ No deference is due to NMFS’s interpretation of the NEPA regulation because NMFS is not the agency solely entrusted with administering NEPA. *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002) (“the court owes no deference to the [the agency’s] interpretation of NEPA or the CEQ regulations because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to the [agency] alone”) (citations omitted).

NMFS asserts that it “appropriately accounted for the importance of the upper Sandy River basin’s use for wild spawning.” NMFS Opp. at 14. However, it cites pages that primarily identify the former Marmot Dam as a location where hatchery fish were sorted from wild fish prior to its removal, and that do not evaluate this intensity factor for significance. AR 16542, 16546. The pages cited for the statement that NMFS made a reasoned determination that hatchery operations will not have a significant impact do not mention of the problems of hatchery fish straying into the wild fish sanctuary or the high stray rates in the five years after the Marmot Dam removal—only “habitat effects” and “mortality.” Two of the cited pages, AR 16967 and AR 16957, are from the BiOp, not even from the EA. And all of the cited pages contain only conclusory statements. Give that NMFS acknowledges that the effectiveness of the proposed operations in reducing stray rates is “uncertain” and “unknown,” NMFS’s general statements about the importance of the upper Sandy River basin do not constitute a “hard look” at effects of operations that allow hatchery fish to continue intruding into the wild fish sanctuary, and do not provide a convincing statement of reasons that the effects will not be significant.

NMFS’s argument is also *post hoc*: NMFS did not invoke the absence of an ecologically critical area in its FONSI, but rather determined that there would not be substantial impacts on unique areas “because [the action] does not involve the construction of any new infrastructure, and because none of the proposed activities occur in such areas.” AR 16666. This rationale in the decision is irrational because (1) the action certainly involves construction of new infrastructure—the weirs—in the heart of the wild fish sanctuary, on designated Wild and Scenic Rivers, and (2) the sorting operations, and the staying of hatchery fish, occurs in these areas.

Finally, NMFS is wrong that plaintiffs must show that the action “will” have deleterious impacts. *NPCA*, 241 F.3d at 730; NMFS Opp. at 14. The explosion of hatchery strays into the

upper basin after Marmot Dam was removed, ODFW's inability to contain stray rates in the past, and the uncertain and unknown efficacy of proposed mitigation to prevent hatchery strays, easily demonstrate that there are substantial questions whether the operation of the hatchery *may* have a significant impact on the ecologically critical areas in the Sandy basin.

b. The effects of the action are highly controversial, highly uncertain, and involve unique and unknown risks.

NMFS's contention that the effects of its actions are not highly controversial, highly uncertain, and do not involve unique and unknown risks, simply recites conclusory statements in the FONSI. NMFS Opp. at 16. These statements cannot be squared with the agency's findings in the EA. The FONSI states that "[t]he effects on the human environment are *all known and minor impacts. No unique or unknown risks have been identified* after applying the result of research conducted over several years in this action area on these and other species." AR 16667 (emphasis added). Yet the EA states that "it is unknown if the operation of the weir/traps will be successful in removing enough of the hatchery spring Chinook salmon adults to meet the 10 percent goal." AR 16538. Similarly, "[i]t would take a number of years to determine whether the acclimation and release of hatchery spring Chinook salmon" in the Bull Run River would reduce hatchery strays into the upper Sandy River Basin. AR 16615. NMFS's own identification of "unknown" risks belies its conclusion that the impacts of the proposed action are "all known."

Given the undisputed harmful effects of high proportions of hatchery spawners among the native populations, and the uncertainty of the most critical mitigation measures, NMFS's conclusion that the impacts from the hatchery will be "minor" lacks support in the EA. Neither of the cases NMFS cites involved a situation where the agency acknowledged, as NMFS does here, that it has no idea beyond pure speculation whether two critical mitigation measures will work as promised. *See Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992) (no

substantial dispute at time of action); *Nw. Env'tl. Def. Ctr. v. Wood*, 947 F. Supp. 1371, 1385 (D. Or. 1996) (agency had “good understanding of the risks and uncertainties”). NMFS is wrong that it “did all that NEPA requires” regarding uncertainty: a “lack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it.” *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 870–71 (9th Cir. 2005).

Declarations showing that an agency failed to consider important factors may be considered in determining whether a substantial dispute exists as to the size, nature, or effect of a project. *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193–94 (9th Cir. 1992) (scientific affidavits may be used to demonstrate that a controversy existed and that agency ignored important factors). The prohibition against creating controversy *post hoc* applies only “when at the time of the [agency’s] action, there existed no substantial dispute that should have alerted the [agency] to the concerns that Greenpeace now raises.” *Greenpeace Action*, 14 F.3d at 1334 & n.12 (9th Cir. 1992). Here, controversy existed before NMFS made its decisions. Native Fish Society commented that “ODFW’s own research shows that acclimation is not a reliable means by which to control stray hatchery spawners,” citing conclusions by Kenaston (2001) that “acclimation is not helpful in achieving higher returns to release sites” and Dittman (2010) “that genetics, environmental and social factors, or requirements for specific spawning habitat may ultimately override the instinct to home to the site of rearing or release.” AR 16753; 37476 (Dittman study); 40683 (Kenaston study). The latter conclusion echoes Dr. Frissell’s point that acclimation in the Bull Run “is utterly antithetical to the long-term evolutionary adaptation of the Sandy River Spring Chinook.” Third Frissell Decl. ¶ 48.⁷ The Court should consider the Third

⁷ McKenzie Flyfishers commented that, despite use of acclimation since 2006, spring Chinook stray rates had reached 78%, noted that it had been ineffective, and that, “given the meager

Frissell declaration as evidence of the highly controversial nature of the project and its unique and unknown risks. *Sierra Club*, 843 F.2d at 1194.

NMFS's statement that acclimation of coho and steelhead has been successful does not answer the absence of any evaluation of the likely success of acclimation at Bull Run in avoiding *spring Chinook* hatchery strays. NMFS omits the significant fact that cooler temperatures were "also the reason why hatchery spring Chinook were acclimated at the Sandy Hatchery." AR 16615. Although NMFS states that low flows in Cedar Creek caused acclimation at the hatchery to fail, NMFS provides no data or substantial evidence justifying its conclusory statement that the Bull Run "will attract and hold" returning spring Chinook. AR 16615. Given that it admits that effectiveness of acclimation will not be known for "a number of years," AR 16615, NMFS cannot claim that it actually evaluated whether or not the acclimation *of spring Chinook at the Bull Run facility* would succeed. Thus, Dr. Frissell is not "rebut[ting] NMFS's expert determination," because NMFS *made no determination* in the BiOp, EA, or elsewhere in the record regarding the likely success of acclimation. NMFS Opp. at 17; AR 16615.

NMFS's observation that weirs elsewhere were "generally successful 'at collecting and removing hatchery adults,'" NMFS Opp. at 18–19, does not answer the question whether the weirs will be successful *in the Sandy River* at keeping spring Chinook stray rates below 10%, given prior problems with high stray rates. NMFS's conclusory statement in the FONSI that genetic impacts are "expected to be low," AR 16662, is irrational because a conclusion of "low" impacts cannot follow logically (and without explanation) from the agency's acknowledgment that the efficacy of weirs and acclimation for avoiding high stray rates is "unknown."

benefits, if any, that conditioning of smolts has demonstrated to date, the prospect of it proving substantially efficacious in the future appears speculative at best." AR 16699. None of the studies NMFS references (at AR 16707) involved the Sandy River basin. NMFS Opp. at 17.

The only concrete, stream-specific evidence NMFS had before it regarding the operation of the weirs in the Sandy River basin were the results of the partial year of operation in 2011, when stray rates were reduced to only about 61%. Plaintiffs and other commenters had raised serious questions whether the weirs would be effective. AR 16700–01; AR 16802–03; 37506–30; 50120–34; 51613–18 (comments and studies illustrating ineffectiveness of weirs). At the time of the NMFS decision, there was a substantial dispute about the effect of weirs and hence about whether the action could possibly achieve the dramatic reductions contemplated.

Finally, NMFS’s appeal for deference throughout this section is misplaced. When an agency argues for deference, the Court may not defer unless the agency—in its decision—has articulated a rational connection between the facts found and the decision made, and provided “a justification for the action supported by clearly identified substantial evidence whose import is explained.” *Nw. Coal.*, 544 F.3d at 1052 n.7; *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1147 (W.D. Wash. 2000) (a “presumption of agency expertise may be rebutted if its decisions, even though based on scientific expertise, are not reasoned”). NMFS has done neither in explaining how it could conclude that impacts were insignificant when the impacts are uncertain and unknown. Because impacts are highly uncertain and controversial, involving unique and unknown risks to ESA-listed fish, NMFS must prepare an EIS for the Sandy Hatchery HGMPs.

c. The proposed action is likely to adversely affect listed fish and threatens a violation of the ESA.

NMFS’s response disregards the language of the CEQ regulations and the low standard for showing that an action may have a significant impact on the environment. The inquiry under 40 C.F.R. § 1508.27(b)(9) is the “degree to which the action *may* adversely affect” threatened

species.⁸ NMFS’s assertion that not all hatchery effects are harmful is misdirection: the cited case also notes that “a hatchery program managed without adequate consideration of its conservation effects” can lead to reduced genetic diversity, reproductive fitness, and productivity. *Trout Unlimited v. Lohn*, 559 F.3d 946, 958 (9th Cir. 2009) (citation omitted).

NMFS has defended differential treatment of hatchery fish in listing decisions on the basis that “[h]atchery releases have a significant negative effect, on the productivity of wild populations by competing with wild fish for food and space; diluting the fitness of wild fish when adult hatchery fish stray and spawn with wild fish; and by potentially spreading disease.” *Cal. State Grange*, 620 F. Supp. at 1158 (finding that “the underlying science regarding the impact of hatchery fish on natural populations and the conclusions reached by NMFS based on that science are entirely undisputed”). If acclimation and weirs are not successful in preventing hatchery strays—and whether they will is “unknown”—there *may* be serious adverse effects to some of the few remaining strong populations of wild fish within the LCR species, and violations of the ESA’s consultation requirements and take prohibition.

B. NMFS Failed to Consider a Reasonable Range of Alternatives.

NMFS misses the point of the recent decision in *Western Watersheds Project v. Abbey*: it confirmed that the evaluation of the validity of an agency’s alternatives analysis in an EA hinges on whether the agency has evaluated all viable alternatives. 719 F.3d 1035, 1050 (9th Cir. 2013). When other feasible alternatives would meet the project’s purpose and need, “[f]easible

⁸ This is a different standard and, with respect to “significance,” a different inquiry than the jeopardy evaluation under the ESA. The Ninth Circuit has not held that a no jeopardy conclusion substitutes for an evaluation of whether there may nonetheless be a significant adverse effect for purposes of NEPA. *Envtl. Protection Info. Ctr. v U.S. Forest Serv.*, 451 F.3d 1005, 1012 (9th Cir. 2006) (“*EPIC*”) (holding only that the agency conducting NEPA review is “not required to disregard” the findings in a biological opinion).

alternatives should be considered in detail.” *Id.* at 1052. In disapproving the EA’s rejection without detailed analysis of no-grazing and reduced-grazing alternatives, the Ninth Circuit emphasized that these alternatives were feasible and would still fulfill the purpose and need for the project. *Id.* Significantly, the Ninth Circuit did not evaluate whether or not the four alternatives considered in detail would have significant effect (which, according to NMFS’s argument, would have obviated the need to consider other alternatives). *Id.* at 1050–52.

Here, NMFS ignored reasonable alternatives that would have met the stated need for fishing opportunities, but with fewer hatchery fish. By doing so, it set up a false choice between adopting precisely what ODFW requested, and completely shutting down the hatchery. NMFS does not refute that it could have met all aspects of its purpose and need statement through other reasonable alternatives, such as reducing instead of just eliminating hatchery fish releases, AR 16552–53, or—regardless of how many fish are released—by including mandatory, certain-to-occur measures that will trigger specific reductions or halt hatchery releases if standards are not met. AR 16804–05. In the cases NMFS cites, which upheld EAs with only a no-action and action alternative, the plaintiffs did not challenge the FONSI, nor assert that an EIS should have been prepared. *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1019–23 (9th Cir. 2012); *N. Idaho Cmty. Action Network v. U.S. Dep’t of Trans.*, 545 F.3d 1147, 1153–54 (9th Cir. 2008). In *Earth Island*, for example, the plaintiffs conceded that the project “will have no significant environmental effects anyway.” 697 F.3d at 1023 (citation omitted). By contrast, hatchery fish can and do have significant adverse impacts on listed wild fish, and NFS has challenged the failure to prepare an EIS.

NMFS’s statement in the EA that the broad range of effects between the “all or nothing” alternatives “eliminated any need to analyze other alternatives” is a tautology: of course any

alternative other than all or nothing would fall somewhere within the range. This describes *any* federal action in which a reasonable alternative of something less than all, but something more than nothing, exists. NMFS's explanation contradicts the Ninth Circuit's ruling that it is not the number of alternatives, or the fact that the single action alternative comprehends the "broadest range of effects," but rather the existence of unexamined, viable alternatives, that causes an EA's alternatives analysis to violate NEPA. *W. Watersheds*, 719 F.3d at 1050–52.

By choosing to portray only the ends of the spectrum of possible effects, NMFS did not consider other reasonable alternative ways the hatchery operations might allow a fishery yet be more protective of wild fish. NMFS dismissed other alternatives, claiming that none would have "allowed for meaningfully different analysis from that of the no-action alternative." NMFS Opp. at 21. This determination is not a reasoned decision because it ignores the breadth of the "spectrum" that NMFS chose to define. It also ignores that an alternative, such as reduced releases, *would* produce markedly different effects: NMFS admits that "significant reductions in juvenile releases will translate into an absolute lower proportion of hatchery to wild adults within the Sandy River." NMFS Opp. at 4. NMFS cannot credibly claim that such an alternative is not "meaningfully different" from the proposed action. This issue is important because NMFS refuses to commit to preparing an EIS for the new Sandy Hatchery HGMPs, or to prepare a Supplemental Draft EIS for the Mitchell Act EIS (due out sometime in 2014) that would include analysis of the new HGMPs. Third Jones Decl. (Dkt # 182) ¶ 7. If NMFS chooses to use only another EA, it is essential that the agency conduct a legally-adequate alternatives analysis.

C. Mitigation Will Not Avoid Significant Effects.

NMFS recognizes that, to avoid preparing an EIS, it must establish that "significant measures" mitigate the adverse effects of hatchery fish. NMFS Opp. at 22. An EA must provide

the Court with sufficient information and data to allow it to evaluate the “sufficiency of mitigation measures” and determine “whether they constitute an adequate buffer against the negative impacts that may result from the authorized activity” so as to “render such impacts so minor as to not warrant an EIS.” *NPCA*, 241 F.3d at 734. A “perfunctory description or mere listing of mitigation measures, without supporting analytical data, is insufficient to support a finding of no significant impact.” *Id.* (internal quotations and citations omitted).

Although hatchery fish straying among naturally spawning populations can cause serious harm, NMFS states “it is unknown if the operation of the weir/traps will be successful” in meeting the 10% stray limit while minimizing impacts to wild spring Chinook. AR 16538. Yet NMFS defends its refusal to prepare an EIS by asserting that it “analyzed the efficacy of the various measures (including the weirs), and determined that they would be expected to be effective.” NMFS Opp. at 22. It cannot be simultaneously “unknown” if the weirs will be successful to meet the stray rate and yet also “expected to be effective” to meet the rate. The same is true with regard to acclimation in Bull Run, where NMFS admits it will be “a number of years” before the effectiveness of that project will be known. AR 16615.

NMFS does not answer the fact that “the more fish that are handled or delayed during migration” at the weirs, “the greater the threat to the species.” AR 16953. The EA lacks any cogent analysis of the weirs’ prospect of success, or the dangers arising from their operation. NMFS simply lists “inducing spawning downstream” as a risk, without data or analysis. AR 16589. It does not evaluate the effects of increased interbreeding between hatchery and wild fish in the concentrated spawning areas downstream of the weirs, or whether any mitigation measures will prevent this. Third Frissell Decl. ¶ 37. NMFS also mentions BMPs, without any data or analysis of why or how NMFS legitimately “expect[s]” they will be effective. AR 16589, 16612.

A “‘mere listing’ of good management practices,” without analytical data to support the proposed mitigation measures, cannot support the EA’s conclusion that mitigation will reduce the harmful effects of straying below significance. *Idaho Sporting Cong.*, 137 F.3d at 1151. And NMFS’s suggestion that monitoring and ongoing evaluation of impacts is enough to show that the effects of the action are insignificant fails due to the uncertain efficacy of mitigation. *See Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1029 (9th Cir. 2011) (“it is not enough to invoke ‘adaptive management’ as an answer to scientific uncertainty”).

As in *NPCA*, the “paucity of analytic data to support the [agency’s] conclusion” and “the uncertainty that exists as to whether the mitigation measures would work” render NMFS’s determination that the mitigation measures will avoid significance arbitrary and capricious. 241 F.3d at 734. Nothing in *EPIC* changes the rule that, to avoid preparing an EA on the basis that mitigation will render significant impacts so minor as to not warrant an EIS, the EA must demonstrate the “sufficiency” of those measures. In *EPIC*, the Ninth Circuit determined that the EA *did* demonstrate the sufficiency of the measures. *Id.* at 1015-1016 (describing “very specific and detailed information” on how the action would be carried out to minimize effects and BMPs that were also “quite detailed”). In contrast, here, NMFS admits that the success of the measures meant to ensure insignificant impacts is “unknown.”⁹ Also, there is scientific evidence of a specific numerical threshold at which harmful effects will manifest—the 5% stray rate—but no

⁹ The other cases NMFS cites do not support the argument that it can forgo analysis of the likely success of mitigation measures. NMFS Opp. at 22–23. In those cases, unlike here, it was possible to tell from the EA whether the mitigation measures would render acknowledged harmful impacts insignificant. *Hapner v. Tidwell*, 621 F.3d 1239, 1246 (9th Cir. 2010) (BMPs approved because they would “minimize” soil disturbance for which there was no specific numerical target); *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1147 (9th Cir. 2000) (non-self-executing mitigation measures to address *unexpected* environmental impacts not unreasonable); *Friends of the Payette v. Horseshoe Bend Hydro. Co.*, 988 F.2d 989, 993 (9th Cir. 1993) (facts allowed a determination that mitigation measures *would be* sufficient, not unknown).

explanation of how, why, or whether mitigation will reduce impacts below that threshold. The absence of analysis, and NMFS’s speculative and conclusory statements in the EA, do not demonstrate that the mitigation measures will render the impacts to listed fish “insignificant.”

III. NMFS VIOLATED THE ESA IN APPROVING THE HGMPs.

B. NMFS’s BiOp Violates ESA Section 7.

NMFS defends the BiOp by asserting that NFS has not demonstrated that NMFS’s conclusions are implausible. NMFS Opp. at 23. This is only a fragment of the *State Farm* standard: a decision is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, *or* is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *State Farm*, 463 U.S. at 43 (emphasis added). The Court must satisfy itself that the agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’”—the absence of which violates the APA. *Id.* (quoting *Burlington Truck Lines*, 371 U.S. at 168). The Court “must judge the propriety of such action solely by the grounds invoked by the agency” in the decision itself. *Chenery*, 332 U.S. at 196.

Although an agency is entitled to decide between conflicting scientific evidence, the agency “must support its conclusions” and “must explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable.” *Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008). “While [a court’s] deference to the agency is significant, [the court] may not defer to an agency decision that ’is without substantial basis in fact.’” *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003) (quoting *FPC v. Fla. Power &*

Light Co., 404 U.S. 453, 463 (1972)). “The presumption of agency expertise may be rebutted if its decisions, even though based on scientific expertise, are not reasoned.” *Brower v. Daley*, 93 F. Supp. 2d 1071, 1083 (N.D. Cal. 2000). And “[d]eference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). As the Supreme Court has emphasized, “[e]xpert discretion is the lifeblood of the administrative process, but ‘unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.’” *Burlington Truck Lines*, 371 U.S. at 167 (citation omitted). The lack of reasoned explanations for conclusions offered permeates the BiOp and renders those conclusions arbitrary and capricious.

1. The BiOp fails to evaluate effects of relevant factors.

A lawful biological opinion must include a meaningful analysis of the environmental baseline together with the impacts of the proposed action; merely listing stressors or impacts without analyzing their effects or whether they will cause jeopardy does not constitute the analysis required to comply with Section 7(a)(2). *See, e.g., Greenpeace*, 80 F. Supp. 2d at 1149–50; *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 127–28 & n.8 (D.D.C. 2001) (invalidating biological opinion because “a mere listing of activities does not constitute an analysis of the *impacts* of these activities, which is what is required by the regulation”).

NMFS argues that it “carefully explains” how existing science applies to the Sandy. NMFS Opp. at 24 (citing AR 16949–57). However, an examination of those pages of the BiOp discloses that NMFS does not, in fact, contain any analysis of several significant factors. The cited section includes a description of a variety of ways in which hatchery operations can harm wild fish. AR 16947–54. But the BiOp contains no discussion of how “out-breeding depression

and decreasing intra-population genetic variability (the two predominant concerns) applies to the Sandy.” NMFS Opp. at 24. NMFS blithely wishes these issues away in the Sandy by stating that “Gene-flow and competition on the spawning grounds is not a threat because the HGMPs impose strict limits on pHOS,” without analyzing whether the limits can or will be met. AR 16958; *see also* AR 16955 (“Interactions on the spawning grounds are not a threat because these program must comply with strict standards for limiting the proportion of natural spawners comprised of hatchery origin fish (pHOS). The pHOS standard is 0.10 for the spring Chinook and coho salmon hatchery programs.”). And none of NMFS’s “analysis” accounts for genetic divergence, within the first generation, of the hatchery-bred fish from the wild populations, or the harmful genetic effects that will accumulate over successive generations. Luikart Decl. ¶¶ 17–24, 28.

a. The BiOp’s analysis of stray rates is inadequate.

The BiOp improperly minimizes the deplorable record ODFW has had in preventing hatchery strays since Marmot Dam was removed. NMFS omits any mention of the magnitude of the problem from its description of the environmental baseline, and omits any clear explanation in its analysis of the proposed action, how or why it expects that the HGMPs will be successful in avoiding jeopardy. Despite clear numerical limits set out in the scientific literature and elsewhere in the BiOp (5% and 10%), the BiOp nowhere lists the percentages of hatchery strays in previous years, and never describes the magnitude of ODFW’s established failure to contain hatchery strays. *See* AR 16928. The BiOp never frankly acknowledges that stray rates in 2010, the last year for which the BiOp presents data for the three listed species, had reached 78% for spring Chinook, 28.6% for winter steelhead, and 24.2% for coho (as reported by ODFW in the approved HGMP), nor that the summer steelhead stray rate averaged 44% in the years shown in Table 3. AR 16928; Lewis Decl. ¶ 55 & Table 2; AR 15626; *see infra* at 28 & n.14.

The BiOp simply assumes away any harm, stating, for example, that “[g]ene-flow and competition on the spawning grounds is not a threat because the HGMPs impose strict limits on pHOS,” without providing a clear explication of the problem, a clear explanation for why NMFS expects a dramatic reduction in stray rates will be achieved in view of the hatchery’s prior failures, or a reasoned explanation of how jeopardy will be avoided in light of the “primary population” status of Sandy River wild populations among the LCR species. AR 16958, AR 2000. This lack of thorough analysis and clarity renders the BiOp arbitrary and capricious. *See Chenery*, 332 U.S. at 196 (“If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable.”).

b. The BiOp’s analysis of the steelhead programs is inadequate.

NMFS’s decision to approve the winter and summer steelhead programs is arbitrary and capricious because the BiOp does not adequately evaluate the status of the two populations and the interactions between them. Table 3 in the BiOp shows that NMFS had no information regarding winter steelhead abundance in 2008, 2009, 2011, or 2012 before it made its decision, in late September 2012, to approve the winter steelhead program.¹⁰ When it argues that it had no data from 2011 and 2012, NMFS is admitting that it made an uninformed decision regarding the baseline status of winter steelhead in the Sandy River. However, NMFS’s claim regarding 2012 data is partially inaccurate: ODFW informed NMFS on June 25, 2012, that it was co-mingling wild and hatchery-bred winter steelhead in unoccupied spawning habitat in Cedar Creek, with a proportion of 91% hatchery-origin spawners among the natural population in that reach. AR 11369. Yet NMFS did not include this data in its BiOp, or evaluate its significance. AR 16958.

¹⁰ It is unclear why NMFS berates NFS for “ignoring” facts from 2013. *See, e.g.*, NMFS Opp. at 4 n.1, 25, 30 n.13. NFS and its experts understand that post-decisional *facts* cannot be used to support or challenge an agency decision, while NMFS flaunts that principle itself.

NMFS *was* able to include some data for steelhead abundance in 2010 in Table 3, but nowhere does NMFS argue that the 28.6% winter steelhead pHOS figure from 2010, Lewis Decl. ¶ 55, was not available to NMFS. Yet NMFS did not include that figure in the BiOp or evaluate its significance. NMFS can point to no evidence or analysis that justifies its approval of the winter steelhead program based on such limited data. The ESA requires NMFS to “use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). This means that an agency “cannot ignore available biological information.” *Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). The Lewis Declaration shows that there was information available regarding winter steelhead for the years immediately preceding NMFS’s approval of the winter and summer steelhead HGMPs. NMFS simply did not seek it out. The justifications NMFS offers *post hoc* only serve to highlight the data it should have gathered, and the analysis it should have performed, *before* it made its uninformed decision to approve the winter steelhead HGMP.

NMFS claims that it “included the possibility of supplementation” as part of the winter steelhead program. NMFS Opp. at 25. That is not true: the final, signed, approved winter steelhead HGMP describes that “the program will be operated as an isolated program using hatchery returning adults.” AR 16339. NMFS admitted as much in its response to comments on the EA. AR 16706 (having hatchery fish spawn naturally to supplement wild fish “is not the goal for the proposed hatchery programs”). There is no mention in the approved HGMP of the use of supplementation to avoid extirpation of the sub-population.¹¹ AR 16338–42. Neither the final EA or BiOp provides any analysis of supplementation or its effects on the wild fish population and

¹¹ The HGMP explicitly provides that, “[b]eginning in 2011, wild winter steelhead arriving at the hatchery will be passed into Cedar Creek upstream of the hatchery *after sorting to exclude hatchery-origin (marked) fish.*” AR 16368 (emphasis added).

the species, and NMFS may not rely on it to downplay existing stray rates or as a justification for having ignored the low abundance of winter steelhead before its decision. AR 16548; AR 16955.

The BiOp simply contains a conclusory statement that “NMFS believes the demographic risk outweighs risks to population productivity and diversity posed by hatchery supplementation,” without any supporting data, analysis, or explanation.¹² AR 16955. As its litigation position, NMFS claims that it had no data about steelhead in 2011 or 2012. Based on that position, NMFS *had no basis* for “weighing the risks.” Its *post hoc* excuse that supplementation can offset low winter steelhead abundance underscores NMFS’s broader failure to conduct a proper analysis of the status of winter steelhead before approving the HGMPs.

NMFS did not take into account the acknowledged harm that non-native summer steelhead have caused to wild winter steelhead in the adjacent Clackamas River basin, or evaluate the extent to which these effects would be present in the Sandy River. NMFS’s discussion of the Kostow paper, NMFS Opp. at 26, is misleading. The “70% total escapement” refers to the percentage of *returning* steelhead in the Clackamas that were hatchery summer steelhead. AR 22538. Any level of “natural production” of summer steelhead would measure smolt production, not returning fish—an apple to the oranges measured in the Kostow paper. More significant are other figures that can be teased from Table 3 in the BiOp and EA.

First, NMFS had no data regarding the prevalence of summer steelhead in the Sandy River basin for the five years before it approved the HGMPs. AR 16928. Thus, NMFS’s decisionmaking regarding the summer steelhead program, and its impacts on wild winter steelhead, was uninformed, lacking in either data and analysis. Second, the summer steelhead

¹² Supplementation is supposedly triggered when natural-origin winter steelhead fall below “critical thresholds” that are not identified or analyzed in the BiOp. AR 16955.

data for 1999–2007 shows that the percentage of returning steelhead that were from non-native summer steelhead stock in the Sandy River was 29%¹³—a figure that is far from insignificant. NMFS’s single reference to that paper, AR 16936, notes that “interactions between hatchery and natural-origin steelhead ... have resulted in reduced productivity for the winter steelhead population,” but does not evaluate why the same harmful effects on wild winter steelhead will not also occur in the Sandy River where 29% of the steelhead were non-native summer stock.

Third, 16% of *all* steelhead in the Sandy River were “unmarked” summer steelhead—i.e. summer steelhead without an adipose fin clip (a nine-year average of 201 unmarked summer steelhead, compared to a 360 total summer steelhead). This represents a pHOS within the summer steelhead population of 44%, and also indicates a significant natural production of non-native, summer steelhead that is competing with wild winter steelhead in the Sandy River.¹⁴

This final figure is disturbing, because the proportion of hatchery-origin spawners among summer steelhead is far higher than the 5% allowed under the HGMP. Nowhere in the BiOp does NMFS address this 44% (or 13%) pHOS for summer steelhead, or why it expects that it will fall below 5% under the HGMP, which makes no changes to the summer steelhead program. AR 16955, 16958. NMFS does not explain in the BiOp why there should be *any* allowable natural spawning of summer steelhead, or any release of hatchery-bred summer steelhead, given the

¹³ This figure is derived by dividing “summer steelhead – total” by the sum of “winter steelhead – total” and “summer steelhead – total” for 1999–2007. AR 16928.

¹⁴ The BiOp does not explain how the pHOS for summer steelhead is meant to be calculated, or which “natural population” is limited to 5% pHOS. If the denominator for the 5% summer steelhead pHOS is *all* steelhead in the basin, then the 1999–2007 figures show that 13% of all steelhead in the basin were non-native, fin-clipped (marked) summer steelhead. NMFS does not address the prevalence of summer steelhead among the total steelhead population, and does not explain why the historical 44% (or 13%) summer steelhead pHOS will not remain above the 5% pHOS limit, with potentially serious effects on the wild winter steelhead in the Sandy Basin.

need to protect wild winter steelhead. Nor does NMFS account for the fact that 16% of all steelhead in the Sandy River were unmarked (non-fin-clipped) summer steelhead, indicating a substantial number of summer steelhead spawning naturally. Steelhead rear in freshwater for two to three years before smolting, AR 22538. Thus non-native summer steelhead juveniles will be present in the Sandy River as wild winter steelhead are hatching, resulting in predation of wild winter steelhead by summer steelhead, for which NMFS did not account in the BiOp. AR 16958.

Finally, “[t]here may be some limited overlap between the very end of summer steelhead season and the very beginning of winter steelhead season,” noting that the winter steelhead *survey season* begins February 1st—not that actual winter steelhead spawning begins then. Lewis Decl. ¶ 47 & n.3.¹⁵ NMFS does not consider the genetic effects of this interaction, despite stating in the BiOp that winter steelhead may return as early as November. AR 16935. NMFS also had before it the recent study by Seamons (2012), explaining that genetic introgression has been measured between early- and late-spawning steelhead even where the overlap is small, and that segregation by life history “failed to prevent genetic interactions between hatchery and wild steelhead populations.” AR 50131–32. Given the paucity of data, the unacknowledged prevalence of straying winter steelhead, *see* NFS Br. at 21, and the unevaluated effects from non-native summer steelhead (including the high summer steelhead pHOS), the BiOp’s conclusion that there will be no jeopardy to winter steelhead is arbitrary and capricious.

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¹⁵ NFS’s opening brief inverted the species by incorrectly referencing the fact, listed in Lewis Declaration footnote 3, that *summer* steelhead in the Sandy spawn in December and January. However, the point remains the same: the spawning of non-native summer and wild winter steelhead in the Sandy is likely to overlap. Third Frissell Decl. ¶ 55. ODFW recognizes as much, and there is nothing in the BiOp or administrative record that supports NMFS’s assertion that Sandy River winter steelhead do not begin spawning until February.

c. The BiOp’s analysis of acclimation and weir effects is inadequate.

NMFS mischaracterizes NFS’s argument regarding the Bull Run acclimation facility in an attempt to justify its failure to analyze whether acclimation of spring Chinook in the Bull Run River *actually will succeed in reducing stray rates*.¹⁶ Spring Chinook were acclimated at the Sandy Hatchery since 2006, yet the stray rate in 2010 was 78%. AR 16699. NMFS’s argument seems to be that Bull Run may be more favorable for acclimation than Cedar Creek, but that does not answer whether the new acclimation point actually will reduce straying.¹⁷ None of the record pages cited is from the BiOp, and none evaluates whether acclimation in the Bull Run actually will succeed in reducing stray rates below 10%. *See* AR 753–755 (ODFW document discussing desired characteristics of an acclimation site, without explanation of why or how Bull Run site will succeed in reducing stray rates); 16873 (describing monitoring without analysis of likely success); 16890 (no analysis of likely success), 16891 (discussion of likely increase in the number of anglers on the Bull Run, not an analysis of acclimation), 747 (email that does not mention acclimation).

ODFW acknowledged that that “the effectiveness of alternative release will not be known until adults return 4–5 years later.” AR 31747. The long-term evolutionary attraction of spring Chinook to the upper basin, high temperatures in the Bull Run River (relative to the mainstem Sandy River and cooler upper basin tributaries), and potential for significant disease transmission if fish actually do return cast serious doubt on whether Bull Run acclimation will affect stray

¹⁶ Even Mr. Turner’s *post hoc* justification still makes no effort to explain *why* or *how* acclimation will be successful at this location in this system, and offers no evidence that NMFS conducted that analysis before issuing its decisions.

¹⁷ NMFS argues that the Bull Run is “low-quality spawning habitat,” NMFS Opp. at 26 n.11, which undercuts its argument that newly acclimated fish are likely to try to return to spawn there.

rates or avoid jeopardy. Third Frissell Decl. ¶¶ 48, 50–51. The BiOp contains no reasoned explanation of why acclimation will succeed. No deference is owed when “the agency has completely failed to address some factor consideration of which was essential to [making an] informed decision.” *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001).

NMFS’s response regarding weirs is another straw man characterization. The issue is not that NMFS “ignored” weir effects, but rather that NMFS (1) failed to consider *other* detrimental weir effects, in particular the effect of concentrating hatchery and wild fish together to spawn prematurely below the weir, increasing the likelihood of interbreeding and genetic introgression, (2) failed to analyze whether *these* weirs in *this* basin will dramatically reduce stray rates or prevent harm to wild fish that constitutes jeopardy from the weirs themselves, and (3) failed to provide any data or rationale for concluding that weir effects will not be “meaningfully beyond background levels.” NFS Br. at 24–25. Statements that NMFS “analyzed the possible impacts based on the best available information,” and found that “experience with use of weirs in the region shows them to be effective overall,” do not explain whether they will be *effective in the Sandy River* in bringing a 78% stray rate below 10%. AR 16964. An agency “must support its conclusions” and “must explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable.” *Lands Council*, 537 F.3d at 994. Without a reasoned explanation of why the facts stated allow the conclusion that weir operation will not result in jeopardy, the BiOp is arbitrary and capricious. *State Farm*, 463 U.S. at 43.

d. The BiOp’s selection of stray rate limits was arbitrary.

The premise for NMFS’s defense of its stray rate limit selection is factually incorrect: the programs NMFS approved are indefinite-term segregated harvest augmentation programs, not integrated programs. *See supra* at 2–5. NMFS officials recognized in May 2011 that they were

dealing with programs involving primary populations of wild fish in which ODFW would not be integrating wild broodstock. AR 2000. In those circumstances, “without natural fish in the broodstock,” Mr. Turner acknowledged that “the low risk criteria allows 10% for two generations and then limits the proportion of hatchery spawners to 5%.” *Id.* The 5% stray rate corresponds to the HSRG recommendation for the maximum level allowable in segregated programs. AR 21326, 37850 (2009 HSRG recommendation of 5% stray rate as the “minimal requirement for minimizing the genetic risks of hatchery programs to naturally spawning populations”). Mr. Turner obviously recognized, in May 2011, that there would be genetic divergence and an enhanced need to keep hatchery-bred fish separate from wild fish after one or two generations, yet the BiOp does not account for this in the selection of the 10% stray rate. Luikart Decl. ¶¶ 17–24.¹⁸ The possibility of ODFW later requesting an infusion of wild broodstock hinged on the wild population becoming more viable, AR 16957, but the HGMP, as approved, allows the hatchery to operate indefinitely, with a 10% stray rate, even if the wild population *never* became sufficiently viable to allow taking of wild fish for broodstock.

NMFS includes a definition of “local fish”—“fish that are no more than moderately divergent from the local natural population”—in a footnote in the BiOp.¹⁹ However, the agency has no genetic data whatsoever from which it could have determined whether the hatchery stocks

¹⁸ The Busack Declaration’s opinions that genetic divergence over time is not a serious issue are impossible to square with HSRG’s conclusion that, for segregated programs, “[a]fter several generations of artificial propagation, segregated hatchery broodstocks may pose genetic and ecological risks to naturally spawning populations that are not unlike those imposed by exotic or introduced species.” AR 21326. Dr. Luikart’s exposition of the problem precisely echoes the HSRG’s concerns. If anything, the Busack Declaration highlights that NMFS should have disclosed the relationship between multi-generational genetic divergence and the appropriate stray rate in the BiOp, and analyzed it, rather than sweeping the issue under the rug. AR 2000.

¹⁹ This definition does not appear to be in the source cited, the Hatchery Listing Policy. 70 Fed. Reg. 37,204 (June 28, 2005); AR 16947 n.9. Nothing in that Policy speaks to what allowable stray rates should for segregated hatchery programs set up with local-origin broodstock.

of winter steelhead, spring Chinook, and coho are, or are not, “moderately divergent” from the local wild stocks. Luikart Decl. ¶ 28; AR 16950 (describing estimated level of gene flow and duration of gene flow as “important” factors to consider).

NMFS present no data or analysis to justify its bald statement that the hatchery fish in the Sandy are “local fish” under NMFS’s definition. For example, prior to 2004, hatchery-bred spring Chinook released in the Sandy River were from Clackamas River stock. AR 16291. ODFW began collecting unmarked spring Chinook from the Sandy for broodstock beginning in 2002, and “[n]on-fin marked spring Chinook were assumed to be of wild origin.” *Id.* However, the BiOp notes that “[s]pring Chinook were not 100 percent marked until the 1997 brood year (2002–2005 adult return years).” AR 16928. Because Clackamas-stock hatchery fish from the 1996 brood year (which returned in 2001–2004) may have been non-fin marked, there is no basis for the assumption that the “wild” spring Chinook collected from 2002 to 2004 in the Sandy River were not from Clackamas River stock. The last release of Clackamas River stock into the Sandy River occurred in 2003 (brood year 2001), from which adults returned between 2006 and 2009. AR 16291, 16928. In 2008 and 2009, 70% of the spring Chinook broodstock was hatchery fish—including returning Clackamas River-origin hatchery fish from the 2003 releases. Use of wild spring Chinook as broodstock ceased after 2010. AR 16291. Thus it is certain that Clackamas River stock were still being mixed into the new Sandy River hatchery stock between 2002 and 2010. NMFS’s assertion that the latter are “local fish” is unsupported in the BiOp, and thus its choice of a 10% stray rate is not supported by its assumption that these are “local fish.”

NMFS also cites no scientific support for its argument that the presence of local-origin stock in a segregated program justifies a different stray rate than the HSRG recommendation. AR 16947–48, 16958, 16964; NMFS Opp. at 29–30. In fact, most of the pages it cites have nothing

to do with stray rate selection. AR 16947 (no discussion of appropriate stray rates, but rather listing effects ranging from “beneficial to harmful” for programs that use “local fish”); AR 16948 (analysis of broodstock selection effects, not a stray rate analysis); 16955 (table listing stray rates without explaining why they were selected). The HSRG recommendation for the indefinitely segregated programs that NMFS approved is a 5% stray rate, and NMFS’s statement that 10% is consistent with HSRG’s recommendations is not supported either by HSRG’s actual recommendations nor the documents it cites from the record.²⁰ NMFS Opp. at 30.

The 10% stray rate for the segregated coho program also is arbitrary in view of the four or five generations of hatchery coho that have spawned since the hatchery program was segregated from the naturally spawning population in 1996. AR 16163, 16928. NMFS did not evaluate the harmful genetic effects that manifest after a single generation of hatchery breeding or those that accumulate over multiple generations in setting the 10% stray rate limit for this program. The HSRG recommendation of a 5% stray limit unambiguously applies to this long-segregated hatchery program, and the BiOp contains no explanation of why the pre-1996 origin of Sandy Hatchery coho from local wild coho justifies ignoring this unambiguous science.

2. The BiOp relies on mitigation that is not reasonably certain to occur.

NMFS argues that it may rely even on uncertain and unlikely-to-succeed mitigation measures to justify its no jeopardy conclusion, but fails to address the Ninth Circuit’s decision in *Greater Yellowstone Coalition*. That case is instructive because the agency relied on adaptive

²⁰ Statements elsewhere that the 10% stray rate is designed to meet the goals in the ODFW 2010 Recovery Plan for the LCR species do not explain that the 10% stray rate in the Recovery Plan was simply a rate that ODFW deemed “feasible”—not a figure derived from the best science on hatchery stray impacts (the HSRG recommendations). AR 17361; AR 16929. ODFW set the 10% stray rate as the feasible rate that, “when combined with other threat reductions” (from harvest or predation, *e.g.*) should lead to delisting. *Id.* However, as NMFS noted in response to comments, the other threat reductions “are not certain to occur.” AR 16834.

management to delist grizzly bears, promising to continue to monitor and then “recommend appropriate management actions” that could include a relisting petition if there were increases in mortality. 665 F.3d at 1029. The Ninth Circuit rejected the suggestion that a discretionary future action by the agency that could benefit the species could operate as a justification for a decision that could harm the species. *Id.* In this case, the agency cannot rely on the *possibility* that it may withdraw the HGMP if mitigation proves unsuccessful to justify mitigation measures that are reasonably certain to occur and insure against jeopardy. *See id.* (“it is no answer to conclude that a species is not threatened simply because it can be relisted if it is threatened.”). NMFS’s power to later revisit its decision (through reinitiated consultation, or review of the HGMP) does not “guarantee the improvements in question,” which in this case are the strict limits on stray rates. *Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 936 n.17 (9th Cir. 2008).

The adaptive management measures endorsed by NMFS suffer from similar defects, and the mitigation is not reasonably certain to occur or be effective. For example, the spring Chinook HGMP imposes no mandatory steps that ODFW must take if it fails to meet stray rates or if weirs fail. *See, e.g.*, AR 16245–49 (performance standards). The adaptive management “plan” is a short list of possible actions the agency may implement; it is devoid of specific management responses tied to specific triggering criteria, any action schedule or other defined, action-forcing criteria that *Greater Yellowstone Conservancy* found to be indispensable. AR 12006–07 (letter describing potential measures to manage spring Chinook program as the agency finds out more about the extent of the stray problem); *see* 665 F.3d at 1029 (“more specific management responses, tied to more specific triggering criteria, are required” for an agency to rely on adaptive management). NMFS may not rely on a non-binding, criteria- and schedule-less plan when the consequence of failure is immediate harm to ESA-listed fish.

Center for Biological Diversity v. BLM, 698 F.3d 1101 (9th Cir. 2012), does not stand for the proposition that merely “incorporating” mitigation into a proposed action insulates it from an inquiry as to whether the mitigation is likely to occur. The question in that case was whether the agency could justify a “no jeopardy” opinion by relying on a conservation plan that was not included as part of the action, not whether the mitigation satisfied the Ninth Circuit’s standard for sufficient certainty from *National Wildlife*, a case the Court did not cite. *Id.* at 1112–13; *see Nat’l Wildlife*, 524 F.3d at 935. That case did not address whether the mitigation actions were likely to occur, and so could not have “held” that the likelihood of mitigation occurring was no longer a “relevant inquiry” in claims involving potential jeopardy to species. *Ctr. for Biol. Diversity*, 698 F.3d at 1110–17. The Ninth Circuit recognized that *any* mitigation included in any proposed action is “enforceable under the ESA.” *Id.* at 1114. The Ninth Circuit did not decide that mere “inclusion” of mitigation in an action is sufficient to justify a no jeopardy conclusion, without addressing *National Wildlife* and whether, substantively, mitigation is sufficiently certain to occur to ensure against jeopardy to a listed species.²¹

None of the cases NMFS cites involved the unknown, uncertain, and likely ineffective mitigation invoked in this case; all but one of them did not involve analyses of whether mitigation measures were reasonably certain to occur. *See, e.g., Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521–25 (9th Cir. 2010) (uncertainty invoked to justify a segmented BiOp, no discussion of mitigation); *Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1164 (9th

²¹ The question whether mitigation measures include “solid guarantees” such that the proposed action will not result in jeopardy to the species is a *substantive* inquiry, and thus the prohibition against adding *procedural* requirements articulated in *Lands Council* is inapplicable. 537 F.3d at 993-94. The reinitiation of consultation regulations under Section 7 applied to the biological opinion in *National Wildlife*, yet the Ninth Circuit nonetheless rejected the no jeopardy call based on mitigation that was not sufficiently certain to occur. 524 F.3d at 924, 935.

Cir. 2010) (uncertainty involved whether habitat was occupied, no discussion of mitigation); *Ctr. for Biol. Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009) (NEPA case, no discussion of mitigation); *N. Alaska Env'tl. Ctr. v. Kempthorne*, 457 F.3d 969, 981 (9th Cir. 2006) (no discussion of mitigation). *Selkirk Conservation Alliance v. Forsgren* is distinguishable because it involved mitigation to be implemented immediately and whose effects the agency had not characterized as “unknown.” 336 F.3d 944, 949 (9th Cir. 2003). Here, ODFW’s mitigation measures are purely reactive, potentially deferred until after the project causes serious cumulative harm to wild fish, and NMFS’s regulations only provide for the possible—not certain—withdrawal of the HGMP, even if mitigation fails. 50 C.F.R. § 223.203(b)(5)(vi).

Finally, the record does not support NMFS’s claimed confidence in the effectiveness of the weirs. While NMFS’s studies have examined the *effects* of weir/trap operation on salmon and steelhead, NMFS fails to cite any evidence of its analysis of their *effectiveness*. See NMFS Opp. at 33 (citing AR 28789, which describes impacts from weir installation but does not analyze weir effectiveness in reducing hatchery stray rate); AR 28978 (permitting direct take of salmon and steelhead from operation of weirs, but not analyzing whether they will effectively reduce stray rates). This is not sufficient to show that weirs are “reasonably certain” to reduce straying.

3. NMFS’s incidental take statement is unlawful.

As detailed above, NMFS acted arbitrarily in adopting the 10% stray rates for listed species in the ITS. NMFS had no genetic information regarding, and performed no analysis of, whether the hatchery stocks were “local” based on NMFS’s own definition that they can be no more than moderately divergent from the natural population. NMFS ignored the best available science in the HSRG reports prescribing no more than a 5% hatchery stray rate for the segregated programs it approved. The BiOp does not explain or analyze why a 10% pHOS limit is proper in

segregated programs approved to continue indefinitely, although NMFS was aware that accumulating adverse genetic effects made a 5% stray rate appropriate. AR 2000.

The 10% stray rate take limits for reinitiating consultation also are arbitrary if they are interpreted to be measured only after three more years of accumulated take, a position that NMFS has advanced in litigation but which does not appear in the ITS (BiOp section 2.9). *See* NMFS' Opp. at 34; AR 19669–73. The BiOp includes the three-year metric only in the reinitiation of consultation section (2.11), without any explanation as to why it is appropriate as a reinitiation trigger—much less whether it is an appropriate way of measuring allowable take. AR 16974. Critically, NMFS nowhere explains why compliance should not be based on *each year's* hatchery performance. A single year's spike of take could wipe out a population, and therefore it is illogical and violates the ESA to not measure take until *three* years have passed. NMFS' arbitrary selection of a 3-year metric does not satisfy the agency's obligation to draw reasoned connections between facts found and conclusions made. *State Farm*, 463 U.S. at 43.²²

If a three-year metric applies to the ITS, then during the next three years the “permissible level of take is coextensive with the project's own scope,” because no matter how much take occurs in year one, no reinitiation of consultation will occur. *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1039 (9th Cir. 2007). An incidental take limit “cannot be so indeterminate as to prevent the [ITS] from contributing to the monitoring of incidental take by eliminating its trigger function.” *Id.* at 1041. NMFS's position eliminates any reinitiation trigger for three years as well, and creates a 3-year gap in its jeopardy analysis that ignores the immediate harm from the

²² NMFS's “clarification” with the state agency that one year's take “may” result in reinitiation of consultation, NMFS Opp. at 34, is both *post hoc* and does not cure the absence of that protective provision in the ITS itself. The ITS must be citizen-enforceable, 16 U.S.C. § 1540(g), and thus a “clarification” with the state alone cannot alter the terms of the ITS.

project—despite 2010 stray rates of 78% for spring Chinook and 28% for winter steelhead.

Waiting three years to measure take vitiates the “‘institutionalized caution mandate’ of the ESA.”

Wash. Toxics Coal. v. EPA, 413 F.3d 1024, 1031 (9th Cir. 2005).

NMFS’s argument regarding take from changes in spawning distribution asks the Court to defer to a void. *Or. Natural Desert Ass’n*, 625 F.3d at 1121. Tellingly, NMFS relies on *post hoc* rationalization to attempt to explain a take limit that is unexplained in the BiOp and for which NMFS offers no support in the administrative record. The standard fails to clearly describe how the agencies or a citizen seeking to enforce the take limit will calculate what the change actually is; whether measuring a change in distribution is appropriate at an *absolute* percentage or a *relative change in* percentage. NMFS simply asserts in its brief that the measurement is “absolute” change—but the ITS does not say this. In previous briefing, “NMFS and ODFW presented conflicting accounts of how it should be calculated and measured.” Opinion & Order (Dkt # 120) at 30. The BiOp contains no justification for why 20% is the appropriate numerical standard—the 20% figure appears to have been chosen at random.

For this metric to be a valid surrogate for take, the BiOp must clearly describe what measurements and baseline are “appropriate,” and must support that conclusion with reasoned analysis. *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1250–51 (9th Cir. 2001). The BiOp does neither, and is thus arbitrary and capricious. The purported clarification with the state agency does not change the fact that, in the ITS, this take limit is “so indeterminate as to prevent the [ITS] from contributing to the monitoring of incidental take by eliminating its trigger function.” *Allen*, 476 F.3d at 1041.

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C. NMFS's Section 4(d) Decision Approving the HGMPs is Unlawful.

NMFS defends its failure to analyze whether the Sandy Hatchery programs will “provide for the conservation,” *i.e.*, recovery, of the LCR species by characterizing it as a procedural challenge to the 4(d) Rule. 16 U.S.C. § 1533(d); NMFS Opp. at 37. NFS’s claim is not a procedural challenge alleging a flaw in the adoption of the rule, but rather a substantive claim that the regulation, as applied by NMFS to the Sandy Hatchery HGMPs, violates the underlying recovery mandate in ESA Section 4(d). 16 U.S.C. § 1533(d). This substantive claim does not seek to add “procedures,” or ask the Court to order NMFS to present “specific evidence,” NMFS Opp. at 38, but rather seeks NMFS’s compliance with the requirement of the statute itself. This claim is neither time-barred nor prohibited by NMFS’s adoption of the 4(d) Rule.

A plaintiff may challenge the application of a regulation to a specific decision for violating the underlying statute long after the limitation period for a direct challenge has run. For example, in *Center for Biological Diversity v. Salazar*, 695 F.3d 893, 904–05 (9th Cir 2012), that Court considered whether a challenge to the application (in 2008) of a regulatory definition adopted in 1983 was time barred. The Ninth Circuit held that the challenge was not time-barred, consistent with longstanding precedent. *Id.* (citing *Nw. Env'tl. Advocates v. EPA*, 537 F.3d 1006, 1018–19 (9th Cir. 2008)); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) (a plaintiff may bring a substantive challenge against “an agency decision as exceeding constitutional or statutory authority ... later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger”).²³

²³ It also is unlikely that the 4(d) Rule would have been ripe for challenge when promulgated. A “regulation is not ordinarily considered the type of agency action ‘ripe’ for judicial review under the APA” until there has been “some concrete action applying the regulation to the claimant’s situation in a fashion that harms him or threatens to harm him.” *Lujan v. Nat’l Wildlife Fed’n*,

Ultimately, NMFS’s defense is circular: it argues that it considered (but rejected) an obligation to provide for species recovery in HGMPs during the process of developing Limit 5, and therefore that it has no obligation to consider whether the HGMPs will “provide for the conservation of”—the recovery of—the LCR species when the agency decides whether to approve a specific hatchery’s plans. NMFS Opp. at 37–38. This does not answer the essential problem that the *statute* requires that the regulations “provide for the conservation of” the threatened species, and that the challenged action (applying the regulations) fails to do so. Both NMFS’s failure to consider whether these HGMPs provide for the recovery of the LCR species, and its interpretation of Limit 5 to preclude such consideration, violate Section 4(d).

NMFS avoids the crux of NFS’s argument that an application of a regulation adopted under Section 4(d) must evaluate whether the approved action will provide for the recovery of the affected species. The Ninth Circuit has emphasized that the “ESA’s primary goal is to preserve the ability of natural populations to survive in the wild,” and that recovery depends on promoting “populations that are self-sustaining *without human interference.*” *Trout Unlimited*, 559 F.3d at 957 (emphasis added). While the Hatchery Listing Policy allows NMFS to include

497 U.S. 871, 891 (1990). Since the Sandy Hatchery HGMPs are the first that NMFS has ever approved in Oregon, this is the first time that Native Fish Society and McKenzie Flyfishers have ever had an “adverse application” of the 4(d) Rule’s Limit 5 in their state.

NMFS’s argument that it must comply with the statute’s conservation mandate *only* at the time that it issues regulations fails because a regulation (and an action applying that regulation) may be invalidated in a substantive challenge where the regulation and the agency’s action conflict with the underlying statute. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070–77 (9th Cir. 2004) (invalidating a biological opinion that relied on the agency’s regulation defining “critical habitat,” issued under ESA Section 4 and based on the statutory definition that “critical habitat” means areas “essential to the conservation of the species,” because the regulation and biological opinion failed to provide for recovery as well as survival, and also invalidating the regulation).

both hatchery and wild fish in a species designation, the Policy must be applied “in support of the *conservation* of naturally spawning salmon” 70 Fed. Reg. at 37,215 (emphasis added).

There are over 50 hatchery programs among the LCR species, but only 16 wild populations not at high or very high risk, two of which are in the Sandy River. *Supra* n.3. All of the wild populations in the Sandy River are “primary” populations within the LCR species. AR 16265. The potential for recovery of these populations in the Sandy River is significant: for example, the City of Portland Habitat Conservation Plan for operation of the Bull Run Water System notes that, for wild spring Chinook, “the Sandy River Basin has the potential to produce up to 5,200 adults,” compared to the 714 wild spring Chinook identified as the population in ODFW’s 2010 status assessment. AR 36892; AR 17031; *see also* AR 17384 (ODFW Recovery Plan showing the “maximum achievable” production of wild Sandy spring Chinook to be 7,871).

Of the 14 primary populations among the three LCR species (including each of the three in the Sandy River), four are deemed “unlikely” to achieve the abundance necessary for delisting in the ODFW Recovery Plan. AR 16265. NMFS’s Section 4(d) Decision did not consider whether the recovery of the LCR species would be accelerated or assured by allowing the primary populations of wild fish in the Sandy River to recover to greater numbers, and more quickly, without pressure from the hatchery programs—an essential inquiry in determining whether the Sandy Hatchery HGMPs will provide for the recovery of the LCR species.

Nothing in NMFS’s argument, or any of the citations it provides to the 4(d) Rule, actually asserts that Limit 5 will “provide for” the recovery of species. NMFS Opp. at 36–38. The requirement of Limit 5 that HGMPs “utilize” the Viable Salmonid Populations (“VSP”) criteria, 50 C.F.R. § 223.203(b)(5)(i)(B), does not satisfy the statutory obligation that Section 4(d) protective regulations “provide for” recovery. NMFS’s argument that the 13 Limits will promote

conservation depends on the quotation immediately before it: only “*when such a program provides sufficient conservation*” for threatened fish does a hatchery HGMP satisfy the recovery mandate in ESA Section 4(d). 65 Fed. Reg. at 42,423 (emphasis added). NMFS recites that “by applying the VSP and PFC concepts *it is possible to make judgments about the contribution certain programs make to recovery.*” NMFS Opp. at 37 (quoting 65 Fed. Reg. at 42,439) (emphasis added). Yet it is that judgment that is lacking in this case: NMFS has not evaluated whether the Sandy Hatchery HGMPs actually will provide for the recovery of the LCR species.²⁴

The Section 4(d) Decision and BiOp note the VSP criteria in passing, without analysis. For example, the Section 4(d) Decision includes recitations of the “critical” and “viable” thresholds for the Sandy River populations, without evaluating whether the proposed action will contribute to meeting these levels and whether, in fact, these levels will “provide for” the recovery of the LCR species.²⁵ AR 17030–31. But that is the end of the discussion, and the Decision does not evaluate whether the HGMPs will actually lead to recovery of the populations to the “viable” thresholds or whether those thresholds—in light of the importance of the Sandy River populations to the LCR species—actually will provide for the recovery of those species.

NMFS failed to provide for the recovery of the LCR species in its approval of the Sandy Hatchery HGMPs, and has not demonstrated that Limit 5 in the 4(d) Rule provides for the

²⁴ NMFS presented no evidence that it evaluated whether the Sandy Hatchery programs would provide for the recovery of the LCR species in issuing its Section 4(d) Decision. Accordingly, NMFS is barred from raising that argument in its reply. *Graves v. Arpaio*, 623 F.3d 1043,1048 (9th Cir. 2010) (“arguments raised for the first time in a reply brief are waived”); *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (“Issues raised for the first time in the reply brief are waived.”).

²⁵ NMFS noted that the “critical” minimum abundance threshold for spring Chinook, coho, and steelhead were 400, 1,800, and 425 respectively, while the “viable” thresholds were 800, 3,300, and 750 respectively—and that the spring Chinook and steelhead abundance were above “critical” but below “viable,” while coho abundance was below “critical.” AR 17030–31.

conservation of affected species, either. To the extent that NMFS interprets Limit 5 of the 4(d) Rule to not require *any* evaluation of whether the HGMPs being reviewed will “provide for” recovery of the affected species, NMFS Opp. at 37, that interpretation contradicts the plain language of ESA Section 4(d), and that aspect of the regulation should be declared unlawful.

D. The Court Should Declare That NMFS Failed to Reinitiate Formal Consultation Properly and Enforce Section 7(d).

NMFS’s argument that NFS invoked the wrong statutory provision is odd. NMFS Opp. at 39. NFS asserted a violation of the regulations requiring reinitiation of consultation, NFS Br. at 35, and NMFS did not reinitiate consultation until September 4, 2013, three weeks after NFS filed its brief. Third Jones Decl. ¶ 8. NMFS does not seriously dispute that the reinitiation trigger for stray rates and new information were triggered by ODFW’s disclosure in December 2012 and February 2013 that spring Chinook stray rates in late 2012 had reached 25-30% and that winter steelhead abundance had dropped drastically in 2012. NFS Br. at 34–35; NMFS Opp. at 39 n.19. The ITS reinitiation trigger is 10% pHOS. Even under NMFS’s concession to this Court that reinitiation would occur “if stray rates were measured in year one at a rate that precluded, or called into question, attainment of the three year average,” Opinion & Order (Dkt # 120) at 30, NMFS should have reinitiated formal consultation eight months ago.²⁶

The agency charged with protecting imperiled anadromous fish should not have waited more than half a year before reinitiating formal consultation; regardless, it violated Section 7(d) by disbursing Mitchell Act funds in August 2013 after its duty to reinitiate formal consultation arose. Third Jones Decl. ¶ 9; *see Or. Natural Desert Ass’n v. Tidwell*, 716 F. Supp. 2d 982, 1006–07 (D. Or. 2010) (“Once formal consultation is required, an agency may not continue with

²⁶ NMFS also does not provide a coherent refutation of NFS’s showing that the spawning distribution change trigger also was met. NMFS Opp. at 39 n.19.

an action that makes an ‘irreversible or irretrievable commitment of resources’”). When reinitiation of formal consultation is required, NMFS must “issue a new Biological Opinion before the agency action may continue.” *Envtl. Protection Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1076 (9th Cir. 2001). The status quo at that time was that Mitchell Act funds were not being disbursed. Second Jones Decl. ¶ 2. NMFS impermissibly deviated from the status quo by disbursing Mitchell Act funds in violation of Section 7(d). *Tidwell*, 716 F. Supp. 2d at 1007.

NFS’s claim that NMFS failed to reinitiate formal consultation *properly* is not moot, and declaratory judgment is available. Even after reinitiation has occurred, “a declaratory judgment could help to remedy the effects of the agency’s statutory violations and to ensure that similar violations would not occur in the future.” *Forest Guardians v. Johanns*, 450 F.3d 455, 462 (9th Cir. 2006). A declaratory judgment will clarify and settle the legal relations at issue and will afford relief from uncertainty and controversy giving rise to the proceedings. *Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1299 (9th Cir. 1992). Here, the Court’s grant of declaratory judgment would delineate “important rights and responsibilities and can be a message not only to the parties but also to the public and has significant educational and lasting importance.” *Id.*

CONCLUSION

Accordingly, and pursuant to the APA, the Court should grant partial summary judgment in NFS’s favor, vacate and set aside the decisions approving the HGMPs, the FONSI, and the BiOp, and order NMFS to prepare a lawful EIS and BiOp before issuing new decisions.

Respectfully submitted this 17th day of October 2013.

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